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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 590

CONSOLIDATED ELECTRIC LAMP COMPANY, et al.,
Petitioners

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners,[1] pray that a writ of certiorari be issued out of and under the seal of this Court to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, dated September 18, 1958.

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[1] Consolidated Electric Lamp Company, General Electric Company, Sylvania Electric Products, Inc., Tung-Sol Electric, Inc., and Westinghouse Electric Corporation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 259 F. 2d 189 (1958). Pursuant to Rule 23, it is included herein as Appendix A, and the opinion in *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 97 App. D.C. 165, which that court deemed controlling, is included as Appendix B. The opinion and order of the District Court, affirmed by the Court of Appeals, appear at pp. 51 and 52 of the Joint Appendix.[2] The administrative determinations of respondent Mitchell, challenged in this action, are printed at pp. 8-24, and pp. 25-31 of the same document.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254. The judgment of the Court of Appeals sought to be reviewed was entered on September 18, 1958.[3]

This case came before that Court on appeal from a final judgment of the United States District Court for the District of Columbia entered on June 27, 1957, granting respondent's motion for summary judgment and holding valid a determination by respondent, the Secretary of Labor, of prevailing minimum wages in the electric lamp industry (52).

The determination, challenged in this action, was made under Section 1(b) of the Walsh-Healey Public Contracts Act (referred to herein as "the Act"), 49 Stat. 2036 (1936), 41 U.S.C. 35 *et seq.*, as amended 66 Stat. 308 (1952). The action was brought by peti-

[2] Unless otherwise indicated, all page references in this petition are to the pages in the Joint Appendix, which the parties prepared for the consideration of the Court of Appeals.

[3] This judgment appears herein as Appendix C.

tioners to declare such determination unlawful and void and to enjoin respondent from enforcing or otherwise giving it effect (1-7).

In this determination, effective August 20, 1956, 21 F.R. 544 (25-31), the Secretary of Labor found the prevailing minimum wage for persons employed in the electric lamp industry to be $1.26 an hour for experienced workers (i.e., persons employed for not less than three months), and $1.20 for beginners. Petitioners, all of whom are listed in the Federal Supply Schedule for electric lamps (235-8), manufacture products including lamps and lamp parts within the scope of the Secretary's definition of the industry, and as persons "adversely affected or aggrieved" within the meaning of Section 10 of the Act, sought judicial review of the determination in the District Court.

In the District Court, respondent, the Secretary of Labor, moved to dismiss and in the alternative, for summary judgment (34-5). Petitioners filed a cross motion for summary judgment (41). The court did not refer either in its opinion (51) or order (52) to the motion to dismiss, and disposed of the case by denying petitioners' motion and granting respondent's motion for summary judgment.

On appeal, the court below in a short per curiam opinion by Judges Washington, Danaher, and Bastian, affirmed the judgment on the ground that the principal issue was foreclosed by its prior decision in *Mitchell v. Covington Mills*, 229 F. 2d 906.

QUESTIONS PRESENTED

1. Where prevailing minimum wages (including the minimum wages in collective bargaining agreements) for persons employed in a manufacturing industry

like the electric lamp industry, differ substantially from one locality to another, does Section 1(b) of the Walsh-Healey Act authorize a determination by the Secretary of Labor of a uniform, nation-wide minimum wage rate for this particular industry, irrespective of the locality where the lamps are manufactured or furnished?

2. Where the Secretary of Labor purports to base his wage determination solely upon the prevailing minimum wages for a "particular" industry in contradistinction to another statutory standard, "prevailing minimum wages for persons employed *in similar work*", may he disregard the limiting phrase "currently operating in the locality" which follows immediately after the words "particular or similar industries or groups of industries", on the asserted ground that "an industry wide determination is permissible where the marketing and competitive factors warrant it"?

3. If the preceding question is answered in the affirmative, does not the finding of nationwide competition among the lamp manufacturing companies as the justification for disregard of local wage differentials, preclude the Secretary of Labor from determining as the "*prevailing* minimum" for the industry, a wage rate higher than the minimum wage rate of any of the competing companies—a rate compelling every manufacturer to increase wages in order to supply lamps to the Federal Government?

APPLICABLE STATUTORY PROVISIONS

The Walsh-Healey Public Contracts Act, Act of June 30, 1936, 49 Stat. 2036, 41 U.S.C. 35.

Sec. 1. . . .

"In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

* * * * * * * * *

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *

The Fulbright Amendment to the Walsh-Healey Public Contracts Act, 66 Stat. 308, 41 U.S.C. 43a:

* * * * * * * * *

"Sec. 10 (a) Notwithstanding any provision of section 4 of the Administrative Procedure Act,

such Act shall be applicable in the administration of sections 1-5 and 7-9 of this Act.

"(b) All wage determinations under section 1(b) of this Act shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 10 of the Administrative Procedure Act by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacture of or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

"(c) Notwithstanding the inclusion of any stipulations required by any provision of this Act in any contract subject to this Act, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality,' 'regular dealer', 'manufacturer', and 'open market'."

STATEMENT OF THE CASE

1. *The Hearing:*— Prior to the issuance of the wage determination challenged in this case, an administrative hearing was held in the Department of Labor. A Bureau of Labor Statistics wage survey of the electric lamp industry was introduced. Evidence was also received from union and industry representatives with respect to the wage rates established by collective agreement and the wage structures of various individual companies and plants.

The industry panel (petitioners here) also presented a survey made by a private statistical agency showing in the localities (i.e., metropolitan or labor market areas) where lamp plants were situated, the lowest established wages of all manufacturing establishments, and also the corresponding rates paid in the manufacturing establishments in those localities where the processing of materials, as in the lamp establishments, consisted primarily of light repetitive operations. The record shows:

The electric lamp industry consists of 27 manufacturing companies, employing about 24,000 workers (57, Govt. Ex. 4, Table 1). The total production of lamps in this country, according to census figures, amounts to $300 million of which the Government purchases about $10 million—approximately 3% of the national aggregate (84). Three of the petitioners, General Electric Company, Westinghouse Electric Corporation, and Sylvania Electric Products, Inc., produce the great bulk of the lamps made in the United States.

There are 21 plants in the lamp division of General Electric making products within the scope of the industry definition; nine in the corresponding division of the Westinghouse; and eight in Sylvania. Of the remaining 24 companies in the industry, all but the fourth petitioner, Tung-Sol Electric, Inc. (which has two plants) have more than one lamp manufacturing establishment. The fifth petitioner here is Consolidated Electric Lamp Company which operates one plant, the Champion Lamp Works at Lynn, Mass.

2. *Geographic differences in union rates*:— Although the lamp industry is heavily unionized, the collective bargaining agreements of the companies with the

three principal unions in the industry; the IUE-CIO, the UE, and the IBEW-AFL, show the absence of national or regional wage standards in the bargaining pattern. Union contracts exist at all nine of the Westinghouse plants (138, 142), at 16 of the 21 General Electric plants (249, 168, 159), three of the eight Sylvania plants (249), and the single Consolidated plant (220).

The IUE-CIO, which represents eight General Electric plants, has a multi-plant agreement with the Company. This contract, however, contains clauses leaving the negotiation of hourly rates to local unions and local plant management (269-270). Starting rates at unionized General Electric locations run from 1.20½ at Lexington, Ky. (159) to 1.425 in Warren, Ohio, and Youngstown, Ohio (249, 167, 168).

Westinghouse has a single master contract with the IUE but this agreement also calls for local negotiation of wage schedules (266). The minima in the four lamp locations covered by the contract range from 1.33 in Fairmont, West Virginia, to 1.43 in Bloomfield, New Jersey and Belleville, New Jersey (249). Four Westinghouse plants in the South, all negotiated for on a single plant basis (89, 90, 138), are covered by agreements with the IBEW-AFL, with a lowest minimum rate of .92 in Little Rock, Arkansas. Thus the union rates in Westinghouse reflect a spread of 49 cents, running from .92 to 1.43, depending on the location of the plant.

The evidence further reveals the only sign of uniformity among union minima tends to be when plants are in the same metropolitan area. Thus, IUE has a contract with Consolidated at Lynn, Mass., establish-

ing a minimum of 1.18 (220) and in the adjacent city of Salem, has a contract with Sylvania establishing a minimum starting rate of 1.20. The starting rate under the UE contract with another Salem plant of Sylvania is the same. This is also the Sylvania minimum rate in nearby Danvers and Ipswich.

The variance in wages between the different lamp production areas is due to the impact of local wage levels. A Sylvania executive testified (121, 123, 124) that whenever a new plant is established the company ascertains from the employment office in the local market area and by visits with other manufacturers in that vicinity, the current wages being paid on various types of jobs. Sylvania then establishes its own wage structure in accordance with the prevailing rates in the area (124). He also stated that even where there are multi-plant union agreements, wages are still fixed on a community basis (125). Similar testimony was received from officials of Westinghouse (137, 138) and General Electric (161-163).

Evidence produced with respect to union rates in the single plant companies was meagre, but did disclose that even though the majority of these companies are in such metropolitan areas as greater New York and Chicago (240), the minimum rates were lower than those found in most of petitioners' plants located in the Northeast and Middle West. A table presented by a trade association representing 16 of these small companies showed minimum rates running from 75 to 95 cents (247-8).

3. *Position of Petitioners*:— The industry panel contended that because there was no uniformity of wages in plants of the same company, even under col-

lective agreements, the Secretary should follow the precedents set in the Bituminous Coal and Steel determinations, i.e., establishing separate minima for areas coextensive with the geographic differentials recognized by collective bargaining agreements. In the Steel case, there had been three such areas, in Bituminous, 25. They urged that in the lamp industry, the data showed the appropriate area was the metropolitan district or local labor market area (12).

Mindful of the observation of the Secretary in the Textile determination—and aware that in some such areas there was only one lamp plant,[4] petitioners urged the Secretary to consider other statutory standards than wages in the particular industry and to base his determination on wages paid for "similar" or "groups of industries" in such localities. In this connection, expert testimony was offered analyzing the tables prepared by the private survey agency of prevailing minimum wages in 37 different localities (Ind. Ex. 25, 26, and 28), from which another table was developed showing the indicated determinations for those areas (274). Thus the Secretary had before him concrete suggestions for the prevailing wage levels and boundaries of some 37 different industrial areas (274).

4. *Effect of Wages on Government Contracts*:—Petitioners also attempted to eliminate another con-

[4] In setting a national wage in that case, the Secretary rejected the locality argument on the ground, *inter alia*, that

> "... no attempt was made to list or otherwise define the factors or circumstances which should be taken into account in determining the limits of such localities and, in fact, it was conceded by counsel that neither they nor the firms they were representing were prepared to offer any concrete criteria which might be applied in delineating such localities." (Textile Determination, p. 6; 17 F.R. 1197, 9).

sideration advanced by the Secretary in the Textile case for refusing to make "locality" determinations. According to the Secretary, the purpose of the Act was

> ". . . to bring about a situation where employers paying fair and reasonable wages would not lose out on Government business to low-paying firms. Under the system of competitive bidding adhered to by the Government, the various contracting agencies must accept the lowest responsible bid . . . . Any construction of the locality language which would result in freezing the lows and the highs in wages would certainly not carry out the purpose of the Act. In other words, if the dominant plant or plants in community A were paying substantially lower wages than plants in community B, the recognition of community A and community B as separate localities would mean that plants in A could continue to underbid plants in B and the situation would be frozen at that level." (Notice of Proposed Amendment . . . Textile Industry, 17 F.R. 1197, 8.

It should be noted that one of the major assumptions in the foregoing is that Government agencies must accept the "lowest responsible bid" to the exclusion of all others. Conceivably this may be true of the Government's methods of procuring textiles. The panel, however, submitted evidence that the Government's plan for obtaining lamps, not being based on such procedure, places no premium on price or wage cutting.

Under the multiple award system developed by the General Services Administration, virtually all electric lamps are purchased by Federal agencies under a single Federal Supply Schedule based on negotiations each year with nine or ten companies (93, 250-265).

The lamps listed on the Schedule are standard types also available to industrial and domestic customers (105, 111). It is not the practice to give any company an exclusive contract on particular items. When a company receives an award, it then circulates to 5200 Government installations its authorized price list on the items for which it is an authorized contractor (94). Each installation has its choice of the company from which it orders provided that manufacturer has received an award.

It is not necessary to be the lowest bidder to obtain an award (250). All that the Government requires is that the quoted prices be "reasonable" (250). Consequently, under the multiple award system, there is considerable variety in the prices charged the Government by the different manufacturers (236-8). The result is that the Federal Supply Schedule includes companies like petitioners, some of whose plants pay the very highest wages in the industry, as well as small companies where wages are substantially lower.

5. *The Determination*:— In rejecting petitioners' case for separate determinations in the different producing areas, the Secretary emphasized that particular plants in the multi-plant companies were parts of an integrated system in which nationwide distribution of the company's products was based upon the flow of lead wires, coils, and bases from various parts plants into assembly plants, some of which specialized in a particular type of lamp, and thence to warehouses where all types of lamps were stocked. From this and from an offer of industry counsel to stipulate that "the marketing area for which the various *lamp companies* compete is nationwide", (15) he concluded that "geographic differentials cannot be adopted for this

industry without defeating the purposes of the Public Contracts Act" (16).

In excepting to this proposed determination petitions pointed out that if a nationwide minimum was required because each of the 27 companies competed for a nationwide market, then the logic of this premise made it incumbent upon the Secretary to take into account only the respective minimum wage in effect in the lowest paid plant of each competing company, rather than using a formula which treated the industry as an aggregate of plants instead of an aggregate of companies.

In his final determination (25-31), the Secretary reaffirmed the proposed minimum of $1.26; even though the evidence showed that this asserted prevailing rate was higher than the minimum of any of the 27 companies covered by the survey on which he relied. Only 25 of the 63 plants studied were shown to have an established minimum rate for workers which was as high as $1.26. Of these 25 plants, 20 were in the General Electric division, four in Westinghouse, and one in Tung-Sol. One General Electric location (Goldsboro, N. C.) was substantially below this level. This was also true of five of the nine Westinghouse plants, the second Tung-Sol plant, all eight Sylvania plants, as well as each of the 23 establishments operated by the 23 other companies.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE ASSERTED AUTHORITY OF THE SECRETARY OF LABOR TO MAKE INDUSTRYWIDE MINIMUM WAGE DETERMINATIONS WITHOUT REGARD TO PREVAILING MINIMUM WAGES IN THE LOCALITY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

(a) Nearly Every Manufacturing Industry is Affected

The first issue of statutory construction which this case presents has such a direct bearing upon the wages practices of nearly every manufacturing industry that it may truly be described as "an important question of Federal law, which has not been, but should be settled by this court". This is the question of the authority of the Secretary of Labor under the Walsh-Healey Act to make national minimum wage determinations for particular industries without regard to well established sectional or area differentials. If the decision of the District of Columbia Court of Appeals upholding such a determination in this case at wage levels substantially above the minimum rate of one dollar an hour provided by Congress in the amendments to the Fair Labor Standards Act in 1955 is permitted to stand, the wage provisions of the Walsh-Healey Act, originally regarded as extremely limited in scope, will have a much greater impact upon the wage structures of industry generally than the later and more comprehensive enactment.

In theory, the actual effect of wage determinations under the Walsh-Healey Act may not seem too great because the rates are binding only upon such companies in the industry covered thereby as may wish to bid on Government contracts. But "what the Court is interested in is the actual practical effect of the disputed decision . . . its consequences for other litigants and in other situations". (Address by former Chief

Justice Vinson to the American Bar Association, Sept. 8, 1949, 69 S. Ct. v, vi).

The fact is that Government purchases today are so tremendous and cover such a wide cross section of industry that very few manufacturers can maintain their competitive position without some Government orders. This means that in practice the large companies are compelled to conform to these wage determinations in order to retain their Government business and small companies will often comply because Government purchases enable them to survive.[5]

Moreover, a determination by the Secretary of Labor has ramifications far beyond the work a particular company performs on Federal contracts. A great majority of manufacturing establishments are integrated in their Government and non-Government production so that even though Government business is only a small proportion of a plant's total volume, the work on the contract is done by the same employees engaged in the production of goods for private consumers.

The electric lamp industry illustrates such an integration. It is a practical impossibility to segregate the employees who manufacture lamps supplied to the Government from the rest of the working force, as Federal agencies purchase nearly every type of lamp listed in the catalogues of the respective manufacturers. Thus, the challenged determination of the Secretary has been felt throughout the entire wage

[5] Under the present Federal budget, the annual volume of Government contracts is estimated to exceed $30 billion—a greater amount than the $20.5 billion in total retail sales predicted by economists for the month of December, 1958 (Washington Rept., Vol. 2, No. 9, p. 3, U.S. Chamber of Commerce).

structure of every lamp manufacturing company on the Federal Supply Schedule.

Until very recent years the far reaching effect of Walsh-Healey Act wage determinations under such an administrative construction of the statute as the Court of Appeals for the District of Columbia has approved, was not fully understood either by Congress or the business community. That is because in the pre-war period of the Walsh-Healey Act most of the wage determinations were made in such small subdivisions of the apparel industry as "mens' work clothing"; "mens' underwear", "mens' neck wear", "mens' hats and caps", or in such minor industries as "tags", "vitreous china" and "evaporated milk". Even in many of those cases, geographic wage differentials were given effect.[6]

In the Department of Labor's first venture into heavy industry—a minimum wage for basic steel—the determination recognized wage differentials in five different steel producing "localities" or regions. Even this decision was challenged in the courts on the ground that the areas were broader than Congress intended.[7] This Court, however, declined to pass on the merits of the determination, holding that the plaintiffs had no standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

Shortly after this decision was handed down, however, the 40-cent floor in the Fair Labor Standards Act became generally effective, thus superseding many of the earlier determinations. With wages sky-rocket-

[6] "The Prevailing Minimum Standard of the Public Contracts Act", Thomas Holland, 1939 (Department of Labor), pp. 265-6.

[7] This contention was upheld in the District of Columbia Circuit. *Lukens Steel Co.* v. *Perkins*, 107 F. 2d 627.

ing in the war and post-war periods, the various Secretaries of Labor had little occasion to make any new industry determinations. In 1950, when a new Secretary of Labor announced an ambitious program for a series of wage determinations that would apply to all industries receiving substantial amounts of Government orders, considerable concern was expressed in Congress at indications that many of the proposed determinations contemplated national rather than local wage minima.

A hearing inquiring into this matter was held by a subcommittee of the Senate.[8] Apparently disturbed by the Secretary's proposed administrative actions, Congress enacted in 1952 the Fulbright amendment intended to override the *Lukens* case by providing for judicial review of wage determinations. The present Secretary of Labor has conceded that Congress has "not" seen fit to affirm the "past practices" of Secretaries of Labor under the Walsh-Healey Act but has "left the matter to resolution of the courts".[9] Obviously this concession is scarcely consistent with the argument, later advanced in his behalf to the Court of Appeals in the *Covington* case, that long legislative inaction was tantamount to Congressional approval or ratification of the Secretary's administrative interpretation of Section 1(b) of the Act.

Notwithstanding the criticisms which had preceded passage of the Fulbright Amendment, Secretary of Labor Tobin in the first determination after its terms had become effective, promulgated a national mini-

[8] Hearings on S. 2594, 82d Cong., pp. 2475 ff.

[9] Decision by James P. Mitchell, Secretary of Labor . . . "In the Matter of Determination of Prevailing Wages for the Woolen and Worsted Industry", January 27, 1954, 19 F.R. 535.

mum wage of one dollar for the textile industry.[10] In an action for judicial review, this administrative decision was pronounced invalid by the District Court.[11] This judgment was reversed on appeal by a divided court consisting of Judges Edgerton, Danaher and Washington, the latter dissenting on the ground that the majority opinion disregarded not only the language but the legislative history of the statute, and that the problem of runaway industry, with which the Department seemed to be concerned, was not intended to be dealt with by the Walsh-Healey Act but by such explicit legislation as the Fair Labor Standards Act.

By the time a petition for certiorari reached the Supreme Court, Congress had made effective an amendment to the Fair Labor Standards Act, establishing the same minimum wage rate set for the textile industry, viz., one dollar for all employees manufacturing goods for interstate commerce. In declining to review the case,[12] this Court accordingly may have been influenced by some feeling that the wage problems created for the textile industry by the Secretary's proposal were academic. It is also possible that the Court may have thought that the time was not

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[10] Determination in Cotton Textile Industry, Jan. 15, 1953; 18 F.R. 472.

[11] *Covington* v. *Mitchell*, 129 F. Supp. 740.

[12] *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 97 App. D.C. 165, *cert. denied*, 350 U.S. 1002 (1956). During the same term the Court also denied an application for certiorari challenging a similar determination for the woolen industry, but in that case the judicial decision sustaining the action of the Secretary of Labor was made in the District Court and the Solicitor General's opposition to the granting of the writ was directed largely at petitioners' failure to perfect their appeal from this judgment to the Court of Appeals. See memorandum in opposition, *Allendale Co.* v. *Mitchell*, *cert. denied*, 351 U.S. 909.

ripe for conclusive adjudication of the issue on the theory that it might be desirable to have different aspects of the issue clarified by the lower courts.[13]

If either of these considerations affected the Court in denying certiorari in *Covington*, neither is applicable here. The construction of Section 1(b) of the Act adopted in the textile wage determination, far from being an isolated instance of administrative caprice (soon cured by the revised Fair Labor Standards Act), has been followed in the past four years by 13 determinations, all, with the exception of one, fixing a nationwide rate. Many of them dealt with industries not subject to wage determinations during the first 20 years of the Walsh-Healey Act.[14]

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[13] In *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918, Mr. Justice Frankfurter said: "Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue illumined by the lower courts. Wise adjudication has its own time for ripening."

[14] The following wage determinations have been made by Secretary Mitchell under the Walsh-Healey Act since he took office in October, 1953.

Industry	Date	Area	Rate
Battery	5/27/57	Industrywide	$1.35 (in major branches)
Bituminous Coal (2) (revised)	11/25/55 10/20/58	23 Districts	several
Drugs & Medicine	9/ 1/58	Industrywide	1.20
Electric Lamp	8/10/56	Industrywide	1.26
Envelopes	12/ 5/55	Industrywide	1.08
Metal Business Furniture	12/ 6/54	Industrywide	1.10
Office Machines	6/18/56	Industrywide	1.10
Paint & Varnish	7/24/58	Industrywide	1.50
Paper & Pulp	12/15/55	Industrywide	1.115
Photographic Equipment	5/ 8/56	Industrywide	1.18
Scientific Instruments	4/25/58	Industrywide	1.20
Surgical Instruments	9/ 1/58	Industrywide	1.25
Woolen & Worsted	5/ 7/54	Industrywide	1.20

Source: Wage and Hour Manual, 90.3-90.9; Bureau of National Affairs.

The list of pending determinations now includes such industries as Tires, Missiles and Aircraft, Electron Tubes and Chemicals. Thus, the final outcome of this case will have repercussions on nearly every major industry.

Moreover, any likelihood that further litigation will produce lower court decisions illuminating other aspects of the issue has been shattered by the summary manner in which the courts of the District of Columbia—the only jurisdiction in which these determinations may be reviewed—have disposed of this case, despite the numerous features of the administrative record distinguishing it from *Covington*.

The brevity of the opinions in the District and Circuit Courts in the instant case indicate that because of the denial of certiorari in *Covington*, the judges regard themselves as bound by the doctrine of *stare decisis* and can no longer give independent consideration to the propriety of nationwide industry determinations under any circumstances. The apparent unanimity displayed in the opinions in the instant case does not reflect the original independent views of the judges of the District of Columbia. District Judges Schweinhaut and Holtzoff in *Covington*[15] and District Judge Tamm in *Allendale*[16] have all held that the word "locality" cannot include the entire United States. Circuit Judge Washington advanced the same view in his dissent in *Covington* and Circuit Judges Bastian and Miller recorded their votes in favor of rehearing *en banc* after the court reached that decision. The concurrence of Judges Washington and Bastian in the

[15] 129 F. Supp. 740-43.

[16] 12 WH Cases 450 (1955).

per curiam opinion in the instant case shows what broad meaning the court is now according to the majority opinion in *Covington*.

Dissatisfied with the scope of the Fulbright Amendment in the District of Columbia jurisdiction, the House of Delegates of the American Bar Association, meeting in Los Angeles this year adopted the following resolution providing for more direct and more extensive judicial review:

> "Resolved, That the Walsh-Healey Act be amended to provide for initiation of judicial review of minimum wage determinations by the Secretary of Labor in the United States Courts of Appeals, instead of the United States District Courts."[17]

Thus, both Congress and the bar are seeking authoritative and conclusive judicial determination of the questions presented here.

(b) The Decision of the Court Below Was Clearly Erroneous

It was an error of statutory construction for the Secretary to hold as he did in this determination that ". . . there is authoritative and compelling support for the conclusion that an industrywide determination is permissible where the marketing and competitive factors warrant it." Whether or not the word "locality" means region or some smaller geographic area, it is clear that Congress intended the phrase "currently operating in the locality" to modify all four of the standards for ascertaining prevailing minimum wages in Section 1(b) of the Act. Consequently, in this case, where the record showed substantial wage

[17] American Bar Association Journal, November 1958, pp. 11-12.

variations in the areas where lamps are produced, the reviewing court erred in not holding an industrywide determination beyond the powers conferred upon the Secretary of Labor by the Act.

The majority opinion in the *Covington* case upon which the court below relied, held that in some industries, only an industrywide minimum would serve the purpose of the Act "because the competition is industrywide". Chief Judge Edgerton, the author of the opinion, went on to say:

> ". . . The District Court's construction of the act would make it necessary for the Secretary to fix separate minima according to the wages that prevail in each separate textile community. This would freeze the competitive advantage of concerns that operate in low-wage communities and would in effect offer a reward for moving into such communities. Obviously this would defeat the purpose of the Act. It would also make the Act nearly meaningless as applied to a large part of the textile industry, since there is frequently only one textile concern in one neighborhood and it necessarily pays the wages that prevail in its plant".[18]

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[18] In this case, had the Secretary given consideration to the independent survey offered in evidence by petitioners which showed prevailing minimum wages for all manufacturing industries as well as for all industries with light repetitive work operations in the various localities where lamp plants were situated (274), he could have avoided any determination which would have made the Act "nearly meaningless". Using this table based on the data relevant to the fourth and third alternative standards in Section 1(b) of the Act, his decision then would have compelled any lamp manufacturing establishment not conforming to prevailing area wages to have come up to the standard in order to be eligible for Government contracts. Thus the possibility envisaged by Judge Edgerton of a single plant, if it happened to be the only one in the particular industry in a given community, writing its own wage ticket, could

We submit that the premise that the Act was intended to deflect Government business from manufacturers whose wage standards conformed only to the prevailing wage pattern of "low wage communities" flies in the face of clear and unequivocal evidence of Congressional purpose. It is true that the Walsh-Healey bill as first introduced was concerned with the possibility of manufacturers in "low wage areas" getting a disproportionate share of Government contracts. As originally written the language requiring the Secretary of Labor to determine minimum wages on the basis of "fair and reasonable value of the services" would seem to have authorized industrywide determinations. The Judiciary Committee of the House, however, struck this language and substituted for it subsection 1(b) which makes the minimum wage standard depend upon prevailing wages in the locality.

On the floor the managers of the bill explained that this amendment removed earlier objections to the proposed legislation by limiting the discretion of the Secretary of Labor so that his only function was to find the prevailing minimum wage in the community,[19] or, as Representative Healey, the sponsor of the bill and chairman of the sub-committee reporting it to the floor, expressed it, "the general locality".[20] Other proponents of the bill made similar explanations. It is unnecessary to describe this legislative history in detail. Relevant portions appear in the appendix

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have been prevented under a determination requiring the payment of rates based upon "prevailing minimum wages . . . for . . . similar industries or groups of industries currently operating in the locality".

[19] 80 Cong. Rec. 10004, 8.

[20] 80 Cong. Rec. 10023.

to this petition as well as in the opinion written for the Court of Appeals by Judge Miller and concurred in by Judge Vinson in *Lukens* v. *Perkins*, 107 F. 2d 627, 70 App. D.C. 354. Suffice it to say that the managers of the bill made it crystal clear to the House that only local determinations were intended.

The Senate concurred in the amended House bill without further amendment and the measure became law on June 30, 1936. Senator Walsh, however, recognized that the House amendment had failed to put manufacturers from "low wage areas" at a disadvantage—as his own original Senate bill would have done. The very next year he introduced a bill[21] eliminating the "locality" restriction in Section 1(b), explaining that the "legislative intent of the present minimum wage section was to direct the administrative authorities to give effect to geographic differentials.[22]

The failure of the Court of Appeals in the instant case to accord any weight to this legislative history is plainly more erroneous than even the approach of the Court in the *Covington* case. In the determination reviewed at that time the Secretary had based his determination on two of the four standards in Section 1(b). Relying upon some evidence of occupational wage data, he found the prevailing minimum for "similar work"—one of the four standards—as well as the prevailing minimum wage for the "particular industry" to be $1.

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[21] S. 2165, 75th Cong., 1st Sess.

[22] 80 Cong. Rec. 3503, 4.

The finding based on "similar work" carried some weight with the appellate court in the *Covington* case, Judge Edgerton remarking,

> "the phrase [currently operating in the locality] is not plainly intended to qualify any other term than 'groups of industries'. *It may or may not be intended to qualify the particular or similar industries.* It can hardly be intended to qualify similar work, for work . . . currently operating in the locality would be a strange expression. The Secretary found that a dollar an hour is the prevailing minimum on similar work. He also found that it is the prevailing minimum in the particular industry. In our opinion these findings were fully warranted." (Emphasis supplied.)

Since the opinion in the *Covington* case conceded that the locality limitation "may or may not be intended to qualify 'the particular or similar' industries", it is plain that the court viewed the statute as ambiguous in this respect. We are familiar, of course, with the principle that if the wording of a statute is so clear that its meaning is unequivocal, resort to legislative history to ascertain meaning is precluded. It is an equally well established canon of statutory construction, however, that where the language is ambiguous, legislative history then becomes controlling.

2. THE QUESTION RESPECTING RESPONDENT'S MISCONSTRUCTION OF THE WORD "PREVAILING" IS ALSO OF MAJOR IMPORTANCE IN THE ADMINISTRATION OF THE ACT.

Another major issue—ignored in the opinions of the reviewing courts, which should also be settled by this court because of its importance in the administration of the Act, concerns the Secretary's interpretation of the word "prevailing". Even assuming, *arguendo*, that the *Covington* decision, relied on by the Secretary

and the courts below in this case, was correct in holding that in some industries an industrywide minimum wage is appropriate "because the competition was industrywide", it would scarcely seem that the Secretary could fix the "prevailing minimum" for that industry at a figure higher than the minimum wage of any of the competing companies.

The paradox of a "prevailing minimum," compelling every lamp company in the industry to revise its wage structure upward in order to be eligible for Government contracts is the outgrowth of a manifestly inconsistent interpretation of the statute. It is true, of course, that two multi-plant employers have higher minima at certain locations, but certainly this fact is relevant only to a determination based upon wages prevailing in local production areas. Respondent refused to make such a determination because competition among lamp companies is nationwide.

He also observed that the multi-plant companies do not utilize their individual plants to make lamps for local customers but use these plants to make either parts, on certain types of lamps which in turn are shipped to central warehouses, the stock of which is used to fill various orders. If such facts, as the respondent contends, call for a national determination, then by the same token each lamp company should be deemed a nationally integrated system and the determination should be based upon the established minimum rate in each such system.

Government contracts are not let to plants or establishments but to companies. Surely it is arbitrary and capricious to assert that a plant should be the unit for determining the minimum rate and, in the same breath, declare that the local economic factors

shaping the wage structure in these units must be ignored because the plant is a mere segment of a competing entity marketing its products on a national scale.

In the determination reviewed in the *Covington* case, the Secretary of Labor did not contend that the purpose of the Act was to raise minimum wages generally but to "prevent the flow of Government business into the hands of firms that pay substandard wages and maintain low employment standards", and that "its purpose was in short to bring about a situation where employers paying fair and reasonable wages would not lose out on Government business to low paying firms."[23]

Yet under the terms of the "prevailing minimum" in this industry all employers, no matter how "fair and reasonable" their wages, were prevented from bidding on Government contracts without some upward wage readjustment.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

REILLY and WELLS
1120 Tower Building
Washington 5, D. C.
Of Counsel

December 17, 1958

[23] Notice of Proposed Amendment to the Determination for the Textile Industry, 17 F.R. 1197.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,142

CONSOLIDATED ELECTRIC LAMP COMPANY, ET AL., APPELLANTS

v.

JAMES P. MITCHELL, Secretary of Labor, APPELLEE
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, APPELLEE-INTERVENOR

Appeal from the United States District Court
for the District of Columbia

Decided September 18, 1958

Before WASHINGTON, DANAHER, and BASTIAN, Circuit Judges.

PER CURIAM: This case, which is similar in nature to *Mitchell* v. *Covington Mills*, 97 U.S.App.D.C. 165, 229 F.2d 506, cert. denied, 350 U.S. 1002 (1955), rehearing denied, 351 U.S. 934 (1956), involves an industry-wide wage determination under the Walsh-Healey Act, 41 U.S.C. § 35(b) (1952), for the electric lamp industry. We think the principal issue here—the validity of the determination—is governed by the decision in *Covington Mills*, and we therefore uphold the determination, on the facts revealed by the record before us. We have considered all the points urged by appellants, but find no reversible error. The action of the District Court in granting summary judgment for the appellee Mitchell is therefore

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12650

JAMES P. MITCHELL, Secretary of Labor, APPELLANT

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12651

JAMES P. MITCHELL, Secretary of Labor, APPELLANT

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

No. 12652

NATIONAL ASSOCIATION OF COTTON MANUFACTURERS, *et al.*, APPELLANTS

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12653

NATIONAL ASSOCIATION OF COTTON MANUFACTURERS, *et al.*, APPELLANTS

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

No. 12654

TEXTILE WORKERS UNION OF AMERICA, CIO,
APPELLANT

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12655

TEXTILE WORKERS UNION OF AMERICA, CIO,
APPELLANT

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

Appeals from the United States District Court
for the District of Columbia

Decided December 1, 1955

Before EDGERTON, Chief Judge, and WASHINGTON and DANAHER, Circuit Judges.

EDGERTON, *Chief Judge:* The Walsh-Healey Public Contracts Act of 1936 provides that any government contract for more than $10,000 shall include a stipulation that all persons employed in manufacturing or furnishing goods under the contract will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; . . ." 41 U.S.C. § 35, 49 STAT. 2036, § 1.

The Secretary of Labor determined in January 1953, after extensive hearings, that the prevailing minimum wage in the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry was $1.00 per hour.

Two separate groups of textile manufacturers brought separate suits against the Secretary, under § 10(b) of the Act, 41 U.S.C. § 43a(b), to set aside and enjoin his determination as illegal.[1] By permission of the District Court the Textile Workers Union of America, CIO, The National Association of Cotton Manufacturers, Berkshire Fine Spinning Associates, Inc., Fitchburg Yarn Company and Hathaway Manufacturing Company intervened as defendants in support of the determination. The cases were consolidated for hearing in the District Court. The court awarded summary judgment to all the plaintiffs and permanently enjoined the Secretary from putting the determination into effect as to any of them, on the ground that the Secretary's authority under the Walsh-Healey Act is limited by the word "locality" and that, therefore, he may not determine a minimum wage on an industry-wide basis. The Secretary and the intervenors appeal.

The policy and purpose of the Act are plain. By statute and regulation, government contracts must go to the lowest responsible bidder. Until the Walsh-Healey Act was passed, it followed that the government, though it urged industry to maintain adequate wage standards, was often compelled to undermine them by contracting with low-wage concerns. The Walsh-Healey Act sought to support standards by withholding contracts from such con-

[1] Before its effective date, the determination was stayed as to the plaintiffs and the Secretary was temporarily enjoined from putting it into effect as to them. While that order was in force, any plaintiff who entered into a contract otherwise subject to the determination was required to post a bond to pay the prescribed wage if the determination were upheld. We entered a somewhat similar order, requiring a bond of $2,000, pending the present appeal.

cerns. "This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary . . ., 'The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops.'" *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128. The Act's "purpose is to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507.

The Secretary's findings of fact make it clear that in the textile industry, unlike some industries, only an industry-wide minimum will serve this purpose, because the competition is industry-wide. The District Court's construction of the Act would make it necessary for the Secretary to fix separate minima according to the wages that prevail in each separate textile community. This would freeze the competitive advantage of concerns that operate in low-wage communities and would in effect offer a reward for moving into such communities. Obviously this would defeat the purpose of the Act. It would also make the Act nearly meaningless as applied to a large part of the textile industry, since there is frequently only one textile concern in one neighborhood and it necessarily pays the wages that prevail in its plant.

Because the Walsh-Healey Act uses the word "locality", the appellees say that the plain meaning of the Act forbids the Secretary to fix an industry-wide minimum. As to the "plain meaning" of an Act of Congress the Supreme Court has said: "When that meaning has led to

absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543.

Moreover, it is not true that the plain meaning of the Walsh-Healey Act forbids the Secretary to fix an industry-wide minimum in this case. It is not plain that every minimum wage determination under the Act must be limited to a "locality". It is not even plain that a large group of States can never be a "locality".[2] The word occurs only in the phrase "currently operating in the locality".[3] The phrase is not plainly intended to qualify any other term than "groups of industries". It may or may not be intended to qualify "the particular or similar industries". It can hardly be intended to qualify "similar work", for "work . . . currently operating in the locality" would be a strange expression. The Secretary found that a dollar an hour is the prevailing minimum on "similar work". He also found that it is the prevailing

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[2] In *Lukens Steel Co.* v. *Perkins*, 70 App. D. C. 354, 107 F. 2d 627, this court expressed a different view. But the Supreme Court reversed the judgment of this court, and affirmed the judgment of the District Court dismissing the complaint, on the ground that the plaintiffs had no standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. This of course left the opinion, as well as the judgment, of this court without value as a precedent.

[3] It has been suggested that the words "in the locality" are not necessarily tied to the words "currently operating", and that "similar work . . . in the locality" is a possible reading. But since it is by no means the only possible reading it is not the "plain meaning" of the Act.

minimum in the particular industry. In our opinion these findings were fully warranted.

The Secretary's interpretation of the Act as permitting industry-wide determinations of minimum wages is not new. In this industry and many others, during many years, the Secretary has made many such determinations. See, *e.g.*, 41 C.F.R. Parts 202 *et seq.* His practice in this respect has repeatedly been called to the attention of committees of Congress. Attempts have been made to write his interpretation expressly into the Act. Attempts have also been made to write it expressly out of the Act. Both have failed. Congress has chosen to leave the interpretation of the Act to the Secretary and the courts. As the Supreme Court said in regard to a different but somewhat related statute, the Fair Labor Standards Act, "We decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so." *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17.

Appellees point out that "purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market" are exempt from the statutory requirement of a stipulation that employees will be paid not less than the prevailing minimum determined by the Secretary. 41 U.S.C. § 43, 49 STAT. 2039, § 9. But this exemption has nothing to do with the only matter here in issue, which is the validity of the Secretary's determination. The Secretary determined nothing with regard to the exemption. He determined that "'The minimum wage for persons employed in the manufacturing or furnishing of the products of the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry under contracts subject to the Walsh-Healey Public Contracts Act shall be $1.00 an hour arrived at either on a time or piece-rate basis." He did not undertake to decide to what contracts the Walsh-Healey Act, and therefore the minimum wage determina-

tion, are applicable. The complaints in these suits do not ask the court to decide that question.[4]

In our opinion the plaintiffs' other objections to the Secretary's determination are likewise invalid.

The District Court thought it need not rule on a motion of the Secretary to dismiss the complaints, on jurisdictional grounds, as to 144 of the 158 plaintiffs. But the fact that some of the plaintiffs clearly have standing, under the Fulbright Amendment, to seek review of the Secretary's determination, confers no standing on others. We think the District Court should decide, in the first instance, which plaintiffs have standing. *Cf. B. F. Goodrich Co.* v. *Federal Trade Commission*, 93 U.S. App. D.C. 50, 56, 208 F. 2d 829, 834. The case is remanded with instructions to rule on the motion to dismiss, unless the government withdraws it or the plaintiffs concerned consent to it. As against plaintiffs who are not dismissed, judgment should be entered for the defendant.

Reversed and remanded.

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[4] It is therefore immaterial that the Fulbright Amendment to the Walsh-Healey Act provides that review of the "applicability" of a minimum wage determination may be had by any "person adversely affected or aggrieved". 66 Stat. 308, 41 U.S.C. § 43a(b).

The Fulbright Amendment also provides that "Notwithstanding the inclusion of any stipulations required by any provision of sections 35—45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality', 'regular dealer', 'manufacturer', and 'open market'." 41 U.S.C. § 43a(c). That is, a contractor who has been required to include a minimum wage stipulation in a contract need not perform the stipulation if the requirement was not in accordance with law. This is irrelevant here.

DANAHER, *Circuit Judge*, concurring: I concur in the entire opinion by Chief Judge Edgerton.

I feel impelled to say this: were it not for the *Textile Workers Union of America, CIO* v. *The Allendale Company, et al.*,[1] I would dismiss 144 plaintiffs on the present record. Moreover, I believe the District Court should have denied intervention by defendants National Association of Cotton Manufacturers, Berkshire Fine Spinning Associates, Inc., Fitchburg Yarn Company, Hathaway Manufacturing Company and the Textile Workers Union of America, CIO, who are now here as appellants on the side of the Secretary. The Supreme Court held[2] in 1940 that determinations by the Secretary under the Walsh-Healey Act[3] as it then was written, are not judicially reviewable. The Act "was not intended to be a bestowal of litigable rights under those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."[4] The function of the Secretary, acting in behalf of the Government, is to find the facts,[5] and make his determination which shall be conclusive upon all agencies of the United States. The Act was designed to permit the Government to supply its needs without the delays necessarily incident to judicial supervision of administrative procedure. "If the general law permits prospective bidders to challenge each wage determination of the Sec-

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[1] —— U.S. App. D.C. ——, —— F. 2d ——, decided July 15, 1955. But see the dissenting opinions.

[2] Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940).

[3] 49 STAT. 2036-2040 (1936), as amended, 41 U.S.C. §§ 35-45 (1952).

[4] *Supra* note 2, 310 U.S. at 127.

[5] § 4, 49 STAT. 2038 (1936), as amended, 41 U.S.C. § 38 (1952); (re the fact-finding function see Shannahan v. United States, 303 U.S. 596, 599 (1938)).

retary in the courts, by a like token all employees affected could obtain judicial review.'[6] We have been advised that "Courts should not, where Congress has not done so, subject purchasing agencies of the Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies."[7] Not only do such expressions by the Court correctly, in my opinion, reflect the understanding and purpose of the Congress, but this case illustrates peculiarly the situation which Congress sought to avoid. It is now nearly three years since the Secretary's determination was promulgated, and it is no more nearly effective now than when it was first made. Yet 144 plaintiffs and 5 defendants as "parties" in the District Court still, because of their status as parties, respectively have rights of appeal no matter which way our order goes.[8]

It is said that these "parties" are thus able completely to frustrate the reasonable fulfillment of the Congressional objectives because "rights" have been conferred upon them by the Fulbright amendment,[9] adopted in 1952. In terms it was provided that review "may be had within 90 days after such determination is made," and ten of the original plaintiffs sought review after the 90 day statutory period had expired. As to them the motion to dismiss should be granted. The Fulbright amendment further provided that review was to be had only "by any person adversely affected or aggrieved" by the determination. Only 14 plaintiffs have made a showing that the determination

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[6] *Supra* note 2, 310 U.S. at 131.

[7] *Id.* at 130.

[8] Cf. Fishgold v. Sullivan Corp., 328 U.S. 275 (1946); Boston Tow Boat Co. v. U. S. 321 U.S. 632, 633 (1944).

[9] 41 U.S.C. § 43(a) (1952).

"results in direct and immediate injury."[10] So, I would dismiss as to 144 "plaintiffs," leaving only the 14 in the Alabama case and none in the Covington case. The named intervening appellants by the Secretary's determination have not been subjected to or threatened with any legal wrong. They have shown no independent legal right. They are not "private Attorney Generals,"[11] and the Secretary is ably represented here by the Attorney General. Even the Fulbright amendment confers no standing upon those who appear on the side of the Secretary. I believe their intervention never should have been allowed.

This is not a case involving a determination of public convenience and necessity such as *National Coal Ass'n* v. *Federal Power Commission*.[12] This is not a case like *Columbia System* v. *United States*,[13] where "the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." This is not a case like *Associated Industries* v. *Ickes*,[14] where by administrative order, the minimum prices at which coal could be sold were increased, thus affecting the very basis upon which transactions in the coal business could be conducted. Nor

[10] National Coal Ass'n v. Federal Power Commission, 89 U.S. App. D.C. 135, 138, 191 F. 2d 462, 465 (D.C. Cir. 1951).

[11] Associated Industries v. Ickes, 134 F. 2d 694, 704 (2d Cir. 1943), *order vacated*, 320 U.S. 707 (1943). The able opinion by Judge Frank treats of almost every conceivable situation except that presented on the record here.

[12] *Supra* note 10. (Even there Judge Clark, in his dissent, argued well that the petitioners were not "parties aggrieved" within the meaning of the Natural Gas Act.)

[13] 316 U.S. 407, 422 (1942).

[14] *Supra* note 11.

is the case like *United States Can Sugar Refiners' Ass'n* v. *McNutt*,[15] or *Longshoremen's Union* v. *Boyd*,[16] where the suit was dismissed for want of a "case or controversy." This is a case, *sui generis*, where "Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy. . . ."[17] No one is forced to bid for Government contracts. Not foreign to our problem are the considerations reasoned by this court in *Alabama Power Co.* v. *Ickes*.[18] I believe the Congressional interest in the attainment of the objectives of the Walsh-Healey Act and the Government's undoubted right to lay down the conditions upon which its own business will be conducted compel a strict construction of the Fulbright amendment. Any other view makes a shambles of the Walsh-Healey Act, for the delays and confusion occasioned by the hordes of "parties" render a determination obsolete and ineffective. Thus those who properly may be parties are those, and only those, who can show themselves by direct and immediate injury to have been adversely affected or aggrieved by the Secretary's determination.

WASHINGTON, *Circuit Judge*, dissenting: The central issue here, of course, is whether the Walsh-Healey Act was intended to establish a nation-wide wage standard for Government contractors, or a standard based on wages prevailing in the contractor's own community. To my mind the language of the statute clearly establishes the latter standard. This court so held in a case decided

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[15] 138 F. 2d 116 (2d Cir. 1943) (where the petition was dismissed for lack of jurisdiction).

[16] 347 U.S. 222 (1954). (The point is certainly present here.)

[17] Ellis v. United States, 206 U.S. 246, 256 (1907).

[18] 67 App. D.C. 230, 91 F. 2d 303 (D.C. Cir. 1937), *aff'd*, 302 U.S. 464 (1938).

shortly after the passage of the Act. *Lukens Steel Co.* v. *Perkins*, 70 App. D.C. 354, 107 F. 2d 627 (1939). The opinion—an exhaustive one—was written by Associate Justice Justin Miller, and was concurred in by Associate Justice Fred M. Vinson, who had become a member of this court after serving in Congress during the very period in which the Walsh-Healey Act was passed. The reasoning of the opinion seems to me unanswerable. And the legislative history there recited shows with complete clarity what Congress intended: that bidders for Government contracts "shall pay the prevailing wages in the community where the work is performed."[1]

Our decision in *Lukens* was reversed by the Supreme Court on another ground—that the complainants lacked standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). The obstacle has now been removed by the Fulbright Amendment, passed in 1952, 41 U.S.C. § 43a (1952). Technically, in dealing with the present case, we are not "bound" by our decision in *Lukens*, even though the Supreme Court did not reach the merits of that case. But its reasoning remains sound, and has not been disturbed by anything which has happened since. As far as the argument based on continued administrative interpretation is concerned, I would suppose that we were not entitled to give much weight to action which was until a short time ago completely immune to judicial review. Nor, under the circumstances here, does congressional failure to amend an act already clear on its face seem to be in any sense declaratory of the correctness of the Secretary's interpretation. The latest pronouncement of Congress—the Fulbright Amendment—certainly makes no such declaration: its passage might suggest, indeed, that Congress was not content with the Secretary's action, and wished it to be reviewed by the courts. The relevant

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[1] Congressman Greenwood at 80 Cong. Rec. 9993; quoted at p. 362 of 70 App. D.C., p. 635 of 107 F. 2d, together with numerous similar statements.

Committee Report specifically states that failure to amend the "locality" provision of the Act is to be without prejudice to a judicial determination of the meaning of that provision. S. Rep. No. 1599, 82d, Cong., 2d Sess. 31 (1952).

It is argued that to give the "locality" provision its ordinary meaning would produce an undesirable result. But—whether or not that is so—our function is to determine what Congress thought desirable, rather than to give expression to our own views on social legislation. It is also said that the purpose of the Act would be defeated by such an interpretation. But I think the majority misconceives the purpose of the Act, as revealed in the light of conditions prevailing in 1936, when it was passed. At that time, and before, it was generally thought that the Federal Government lacked power to undertake broad regulation of wages and labor standards. Control of Government contracts was thought possible, however, and in 1931 the Bacon-Davis Act was passed, imposing certain wage regulations in the field of Government construction contracts, 46 Stat. 1494. In 1935 that Act was substantially revised and strengthened, 49 Stat. 1011. The 1935 revision provided—in language derived from the earlier legislation—for wage determinations based on conditions prevailing in the "city, town, village, or other civil subdivision" where the contract is to be performed. In 1936 the Walsh-Healey Act was passed to cover the field of supply contracts. Here Congress used the "locality" provision we have been discussing. Obviously both acts are based on the same philosophy and point to a standard limited to a fairly small area and to a restricted objective: that of preventing contractors from cutting wages below prevailing community levels in an effort to pare costs and thus be the lowest bidder. As the legislative history shows, there was no thought of raising wages, or of eliminating regional differentials. See *Lukens* at p. 362 of 70 App. D.C., 635 of 107 F.2d.

Later, of course, greater breadth of Federal power was recognized. The Supreme Court's decision in *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937), opened the door to more sweeping congressional action. Problems such as that of the "runaway industry," which were not intended to be dealt with by the Walsh-Healey Act, but which may underlie the Secretary of Labor's approach to that Act, may now be dealt with by explicit Federal legislation. Congress has gone far in this direction through the Fair Labor Standards Act and its amendments. Indeed, under an amendment shortly to come into effect, the minimum F.L.S.A. wage will be raised to a dollar an hour. Public Law 381, 84th Cong., 1st Sess. § 3 (1955). That, of course, is the same as the Secretary's determination here. Surely it is better to reach decisions of that sort through congressional debate and action, rather than through strained administrative and judicial interpretation of a statute passed years ago for a different and more limited purpose.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,142

CONSOLIDATED ELECTRIC LAMP COMPANY, ET AL., APPELLANTS,

v.

JAMES P. MITCHELL, Secretary of Labor, APPELLEE,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, APPELLEE-INTERVENOR.

Appeal from the United States District Court
for the District of Columbia

Before WASHINGTON, DANAHER, and BASTIAN, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Dated: Sept. 18, 1958

PER CURIAM.

APPENDIX D

[Excerpts from legislative history of Walsh-Healey Act, quoted in footnotes 31 and 32 of majority opinion in *Lukens Steel Co.* v. *Perkins*, 107 F(2) 627, 634-5 (C.A.; D.C., 1939).]

Extracts from Congressional Record, Vol. 80, Part 9, 74th Cong., 2d Sess.: (Page 9992.)

"Mr. Greenwood. Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey Bill, which bill regulates specifications in connection with the purchase of supplies by the Government of the United States. It provides that no less than the prevailing minimum wage shall be paid to workers in the community where the supplies are manufactured or where the work is performed."

(Page 9993.)

"Mr. Greenwood. This bill provides that they shall pay the prevailing wages in the community where the work is performed; so the bill takes care of the very proposition of which the gentleman speaks."

(Page 10008.)

"Mr. Citron. The bill before us is in substance an extension of the Bacon-Davis Act to all Government purchases amounting to over $10,000.

* * * * * * * * * *

"The bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those * * * (4) who pay less than the prevailing rate of wages in their community, * * *."

The original bill introduced by Congressman Healey (H.R. 11554, 74th Cong., 2d Sess.) contained the following language: "* * * minimum wages fixed under this Act shall be such wages as are fairly and reasonably commensurate with the value of the service or class of service rendered." This language, however, was omitted from the bill as enacted. The reason therefor appears clearly from the statements of the managers on the floor of the House as follows:

(80 Cong. Rec. 10003.)

"Mr. Healey. That is an administrative problem. As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is."

(80 Cong. Rec. 10004.)

"Mr. Walter. . . . If there is any grave difference of opinion with respect to any portion of this bill it certainly comes with respect to the possibility, if you please, of the Secretary of Labor fixing wages. There is no Member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but there is nothing in this measure that gives to anyone in any executive branch any authority to fix wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act. It has been a comparatively simple matter to go into each community in which Government buildings are being constructed, and determine what every particular artisan is paid in that community. The problem is the same here."

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No. 590

In the Supreme Court of the United States

OCTOBER TERM, 1958

CONSOLIDATED ELECTRIC LAMP COMPANY, ET AL.,
PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF LABOR IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF LABOR IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court for the District of Columbia (Joint Appendix (J.A.), p. 51) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A) is reported at 259 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1958. The petition for a writ of certiorari was filed on December [illegible] 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether this Court should now review the adherence by the court below to its earlier decisions, which this Court declined to review, upholding the statutory authority of the Secretary of Labor to determine a single industrywide prevailing minimum wage under the wage determination provisions of the Public Contracts Act.

2. Whether, in the circumstances of this case, the Secretary's wage determination, made pursuant to his authority under Section 1(b) of the Public Contracts Act to determine "the prevailing minimum wages for persons employed" in a particular industry, is valid and lawful.

STATUTES INVOLVED

The pertinent provisions of the Walsh-Healey Public Contracts Act of 1936, 49 Stat. 2036, *et seq.* (41 U.S.C. 35, *et seq.*), as amended by the Fulbright Amendment of June 30, 1952, 66 Stat. 308 (41 U.S.C. 43a), are printed in the petition for a writ of certiorari (Pet. 5–6).

STATEMENT

1. *Administrative Proceedings.* On March 19, 1955, the Secretary of Labor gave notice that a public hearing would be held for the determination of prevailing minimum wages in the electric lamp industry (J.A. 230–233). A detailed statement as to the questions to be considered and the procedure to be followed at such hearing were set forth in the notice (J.A. 231). Public hearings were held, attended by management and labor representatives, between April 26, 1955 and May 27, 1955 (J.A. 9), and the record held open until

August 17, 1955, for the receipt of proposed findings, briefs, and arguments on the issues considered (J.A. 10).

On April 6, 1956, the Secretary issued his Notice of Proposed Determination in which he considered in detail all of the issues presented and all of the evidence and arguments of the interested parties (J.A. 8–25). Further opportunity was afforded to the parties to submit exceptions to the proposal (J.A. 25). After careful consideration of such exceptions (J.A. 25–29), the Secretary issued, on July 20, 1956, his minimum wage determination for the electric lamp industry, providing, principally, for a minimum wage of $1.26 an hour (J.A. 29–31).

2. *Nature of Administrative Determination.* The electric lamp industry consists of 63 plants, employing about 18,732 covered workers. Of these 63 plants, 40 are operated by 4 multi-plant companies, petitioners herein, which produce the great bulk of the lamps made in the United States. The smaller firms operate the remaining plants.

At the hearing and in argument, industry representatives contended that the Secretary lacked statutory authority to determine industry-wide rates, but, rather, was limited to action in each locality in which electric lamp plants were located (J.A. 11–12). In accordance with this contention, an extensive wage survey of 37 localities was introduced (J.A. 12; Pet. 10).

The Secretary rejected the limiting interpretation of his authority, pointing to the then recent decision of the Court of Appeals for the District of Columbia

Circuit in the *Covington* case[1] which sustained his power to make industry-wide determinations where warranted by marketing and competitive factors (J.A. 13). He then proceeded to a consideration of the uncontroverted evidence as to marketing and competitive factors, which may be summarized as follows (J.A. 13–16):

Electric lamp plants are located in various parts of the country, with the heaviest concentration being found in the Middle Atlantic Region; of the 63 establishments in the industry, 25 are located in the Middle Atlantic Region, and varying lesser numbers in six other regions throughout the country; as demonstrated by a detailed analysis of lamp shipments to Air Force and Navy installations, the marketing pattern of the industry in relation to government purchases is not restricted to the region in which a plant is located, but each of the companies ships to installations in most of the seven regions, which include 17 states and the District of Columbia, extending from New York to California and New Hampshire to Florida; some of the companies shipped to all seven regions and in no instance did a majority of the shipments from any firm go to any one region; although 40% of all plants in the industry employing 34% of the total covered employees are located in the Middle Atlantic Region, only 19% of the shipments, representing only 7% of the total value of all shipments, went to destinations within that Region; the warehouses, from which a large proportion of the government purchase

[1] See pp. 7–8, *infra*.

orders are filled, are distributed throughout the country, and each of these warehouses is supplied with lamps produced in plants located in the various different regions, so that no plant serves any specific geographic area exclusively and it is impossible when bids are invited to predict in which plant or plants any particular contract materials will be manufactured. On the basis of this and other similar undisputed evidence, the Secretary found (J.A. 15–16):

> It is thus apparent that no geographic limitations are feasible in this industry. The area of competition is industry-wide. Firms, no matter where located, generally ship their products all over the country. Multi-plant firms do not make every type of lamp in each of their plants, so that no plant may be said to serve any specific geographic area exclusively. It is impossible to predict precisely where any particular contract materials will be manufactured when bids are invited. For these reasons I find that the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under Government contracts extends to all of that area in which the industry has its plants, and that geographic differentials cannot be adopted for this industry without defeating the purposes of the Public Contracts Act.

The Secretary next gave careful consideration to wage data (J.A. 16–21)[2] and reached his proposed determination (J.A. 23–25).

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[2] The Secretary noted that the tabulation of wage data submitted by the industry panel was based on employment in various industries in 37 localities, and not in the lamp industry

The industry attack on the proposal urged that the Secretary should have relied on the wage practices in the companies (as a whole), rather than in the various plants, in the industry (J.A. 27).[3] The industry panel contended that a great majority of the lamp companies operate plants where wages substantially below the proposed minimum were paid (J.A. 27).[4] On examination of this contention, the Secretary noted that 77% of the employees in the industry were employed in 35 plants which paid no experienced worker less than $1.26 an hour (J.A. 27). Moreover, the Secretary noted that no less than the proposed minimum was paid by General Electric at 18 of its 19 plants, by Westinghouse in 5 of its 9 plants, and by Sylvania in 5 of its 8 plants (J.A. 27).[5] In the light of these facts, the Secretary found that acceptance of the "companies" test would

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alone (J.A. 19). The Secretary pointed out, in weighing this tabulation, that Section 1(b) of the Act requires that the determination of "prevailing" minimum wages must be based on wages paid in that industry rather than in some other industry (J.A. 27).

[3] As noted above, the Secretary's proposed determination was issued on April 6, 1956. On March 26, 1956, this Court had denied certiorari to review the *Covington* case. 350 U.S. 1002.

[4] The petition for certiorari makes this same suggestion (Pet. 4, Question 3; Pet. 26–27).

[5] See also the affidavit of the Assistant Administrator of the Public Contracts Division, Department of Labor, in support of the Secretary's motion to dismiss (J.A. 35–40).

The Secretary contends that all of the petitioners, except Westinghouse, lack standing to sue. See J.A. 34–35; cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 123, 125, 132; Danaher, J., concurring in *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 511 (C.A.D.C.); opinion of District Judge Youngdahl in *Allendale Co.* v. *Mitchell*, 12 WH Cases 760 (D.D.C.).

mean that employees of all plants of a company would be treated as though employed at the lowest wage plant (J.A. 27).

3. *Proceedings Below.* Petitioners instituted this action, by complaint filed October 18, 1956, under the authority of the Fulbright Amendment, 41 U.S.C. 43(a), which authorized judicial review of minimum wage determinations in the manner provided by the Administrative Procedure Act, 5 U.S.C. 1009 (J.A. 1–7). After answer (J.A. 31–33), the Secretary filed a motion to dismiss and for summary judgment (J.A. 34–35).* The District Court granted the Secretary's motion for a summary judgment, holding that it was impossible to see "* * * how this case differs in substance and effect from the so-called *Covington* cases. * * *" (J.A. 51). On appeal, the court below, in a *per curiam* opinion, affirmed, stating that "* * * the principal issue here—the validity of the determination—is governed by the decision in *Covington Mills,* and we therefore uphold the determination, on the facts revealed by the record before us. * * *" (Pet. App. 1a).

ARGUMENT

1. The power of the Secretary of Labor to determine minimum wages on an industry-wide basis was sustained by the court below in *Mitchell* v. *Covington Mills,* 229 F. 2d 506, certiorari denied, 350 U.S.

* As indicated above, fn. 5, the Secretary's motion to dismiss was based on the contention that petitioners lacked standing to sue.

1002, rehearing denied, 351 U.S. 934.[7] In opposing the grant of certiorari in the *Covington* case, the brief in opposition on behalf of the Secretary of Labor pointed out that, while the question of statutory authority under the Public Contracts Act to make wage determinations of the type here involved was one of importance, the decision of the Court of Appeals was so clearly correct that the public interest, in view of the delay entailed by litigation, would best be served by a denial of review (Br. in Opp., No. 682, October Term, 1955, pp. 10–11). To support this position, the argument was presented in detail in order that the question might be resolved not only in the textile industry, the industry there concerned, but also in other industries where similar litigation was pending or imminent (Br. in Opp., No. 682, *supra,* p. 30). The argument covered every aspect of the problem, including every substantial argument now advanced by petitioners herein, and demonstated that the language of the statute, the long-standing administrative construction of the Act, and the understanding and purpose of Congress, required the conclusion reached by the court below (Br. in Opp., No. 682, *supra,* pp. 11–28).

We respectfully refer the Court to the brief in opposition in the *Covington* case as dispositive of the arguments advanced by the present petitioners.

2. Petitioners, however, suggest that, without regard to the identity of the arguments and problems

[7] See also *Alabama Mills* v. *Mitchell*, 244 F. 2d 21 (C.A.D.C.), certiorari denied, 355 U.S. 834; *Allendale Co.* v. *Mitchell*, 12 WH Cases 760, certiorari denied, 351 U.S. 909.

involved in this case and in *Covington*, the moment for adjudication by this Court has now arrived by reason of the lapse of time since the *Covington* decision (Pet. 18–19). We believe that the passage of time compels exactly the opposite conclusion.

Our primary position, in opposing certiorari in the *Covington* case, was that there existed a consistent and long-continued administrative construction of the Public Contracts Act as to the power of the Secretary of Labor to determine minimum wages on an industry-wide basis where the relevant factors of record warranted such a determination. We further showed that this construction of the Act accorded with congressional purpose, and was known to and had been ratified by Congress. The passage of time since *Covington* underscores the validity of the position which we took in that case. There has been no effort by Congress to question in any way the view which was expressed as to the Secretary's powers in the *Covington* case, and which was accepted by the court below in its decision there. In short, the question has at all times been one of congressional purpose and understanding, and the acceptance by Congress of the Secretary's views of his power under the statute, both before and since the *Covington* decision, renders review by this Court even less necessary now than it was at the time the petition for certiorari in *Covington* was filed.

3. The main thrust of the petition is to question the power of the Secretary recognized in *Covington*. Petitioners also argue, however, that, conceding this power in the Secretary, it must be exercised by examining

the positions of *companies* rather than *plants* (Pet. 25–27).

The contention is a curious one, which arises from the peculiar circumstances of the electric lamp industry. Clearly, if all the plants in the industry were each owned by a separate legal entity, the "companies" test would result in the same determination which was made by the Secretary in this case. In other words, petitioners are urging that, because four of them have acquired 40 of the plants in the industry, they are entitled to have the prevailing minimum wage determination reduced to the level of the minimum of their lowest-wage plant.[8]

Realistically, this contention would mean that any multi-plant company could enlist the assistance of the Secretary in reducing wages by using as a measure the lowest-wage establishment operated by that company.[9] We submit that the argument flies in the teeth of both the statutory language and the statutory purpose. First, Section 1(b) of the Act requires the Secretary to determine prevailing minimum wages "* * * for persons employed * * * *" in the particular industry. The "companies" test suggested by peti-

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[8] As shown in the affidavit of the Assistant Administrator of the Public Contracts Division, Department of Labor, *supra*, p. 6, fn. 5, there has been a tendency in the electric lamp industry to locate new plants in low wage areas of the country (J.A. 39–40).

[9] This Court has recognized that the Public Contracts Act is designed "* * * to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128.

tioners would have little relationship to the statutory "persons employed" requirement. Second, a major purpose of the Act, as recognized by this Court, is "* * * to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507; *Mitchell* v. *Covington Mills, supra*; *Ruth Elkhorn Coals* v. *Mitchell*, 248 F. 2d 635 (C.A.D.C.). Again, it is obvious that the technical limitation, derived from the peculiar structure of the electric lamp industry, which petitioners seek to impose on the Secretary's power would thwart, rather than carry out, this recognized congressional purpose.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

ANTHONY M. GRESKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 591

ANTHONY M. GRIECO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. Ex. B) is not yet reported. The memorandum of the district court denying the motion for a new trial is not reported (Pet. Ex. A).

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1958 (Pet. Ex. B). The petition for a writ of certiorari was filed on December 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the trial court erred in refusing to grant petitioner's motion for a new trial based upon a letter from one juror that another juror was abusive to her before she joined in the verdict.

STATEMENT

On April 30, 1958, in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a nine-count indictment charging him with embezzlement of the mails and conspiracy (R. 2). The foreman reported the verdict on each count, and the clerk then asked the jury "You find the defendant Grieco guilty on counts one through nine, and so say you all?" The record then reads "The jury answers in the affirmative" (R. 15–16).

On May 5, the court received a letter from Mrs. Jean Curl, one of the jurors who participated in petitioner's trial. The letter stated (R. 19, 20; Pet. 5):

> My name is Mrs. Jean Curl, juror number eleven, in the Case of the United States vs. Mr. Grieco. This case was held in your court Monday April 28 to Wednesday April 30.
>
> I urgently need your advice because I haven't had any rest or peace of mind since last Wednesday.
>
> While in the jury room one juror was very abusive to me because I was the only one to find Mr. Grieco not guilty and holding everyone up. He got me so nervous that my heart was pounding. I was shaking and crying and so

confused that I finally said guilty. I want to retract that because I don't feel that I was in any condition at that point to render such an important decision affecting this man's future. Kindly advise me what to do.

On May 8, 1958, the court summoned counsel for the government and the petitioner and introduced this letter into the record as Court's Exhibit #4. May 15 was set for the receipt of any motions based upon the letter (R. 19; Pet. 5).

On May 15, petitioner made a motion to set aside the verdict and grant a new trial or, as an alternative, to reconvene the jury and take testimony regarding the allegations in the letter (R. 20–26; Pet. 6). The court ordered that no contact be made with Mrs. Curl, and, on May 22, petitioner's motion was denied (R. 3). On May 28, the trial judge in chambers, in the presence of both counsel, suggested that counsel for petitioner move for reargument, indicating that he would agree to summon Mrs. Curl for a limited inquiry into the alleged irregularities, the inquiry to be conducted by the court alone. On June 2, 1958, over objections of petitioner's counsel to the method of questioning and the failure to call the whole jury, the court took the testimony of Mrs. Curl (R. 26–36).

Mrs. Curl stated that she was a housewife with three years of high-school education and had been in the theatre. She had no physical or mental disabilities (R. 30–31). She said that the juror of whom she complained did not threaten her or do anything, that he upset her only by what he said and the way he spoke (R. 27–28). He spoke to her in a mean, shout-

ing tone of voice, and every time she said anything he yelled and told her that she had no common sense and that what she had to say had nothing to do with the case (R. 27–28). "In general he was yelling all the time," she stated (R. 28). About the fifth time he interrupted, another woman juror said "Let her talk," and Mrs. Curl finished what she wanted to say. She stated that she voted for the verdict that was rendered (R. 30).

After the examination, petitioner's counsel submitted thirteen questions for the court to propound to the juror (R. 37–38). The court asked questions relating to communications with the juror after the verdict (R. 32–36). It declined to ask questions relating to Mrs. Curl's belief in petitioner's guilt, or to have the juror of whom complaint was made identified. The court then denied the motion for reargument (R. 36). On May 27, petitioner was sentenced to 18 months on each of the nine counts, to run concurrently (R. 3). The Court also sentenced him to a consecutive term of 18 months on a second indictment to which he had pleaded guilty.

On appeal, the Court of Appeals affirmed the order of the district court (Pet. Ex. B) and upheld petitioner's conviction.

ARGUMENT

Petitioner contends that the instant case presents an exception to the rule that the testimony of jurors will not be received to impeach their verdict. He further argues that, once the testimony of Mrs. Curl was received, the court should have summoned the

other eleven jurors and taken their testimony as to what occurred during their deliberations (Pet. 9-12).

This Court said in *Mattox* v. *United States,* 146 U. S. 140, 149:

> "* * * the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." * * *

See also *Clark* v. *United States,* 289 U. S. 1; *McDonald* v. *Pless,* 238 U. S. 264.

Mrs. Curl's testimony related solely to the "influences which affected" her deliberations. She stated that the offending juror got her "mixed up" by yelling at her and repeatedly told her that what she had to say had nothing to do with the case. She did state, however, that eventually he kept quiet and permitted her to say what she wanted to. She voted for the verdict and did not express disagreement when the clerk asked the jury if the verdict was theirs. All that is involved is the mental processes by which the juror reached her verdict. That, under long-established decisions of this Court, is not a basis for impeachment.

To make certain that this was not such an extraordinary case as might justify departure from the

long-established rule discussed above, the trial court did question Mrs. Curl. If it erred in so doing, it erred in giving petitioner more than was his due. But since, from the testimony of Mrs. Curl herself, it became evident that this was not a case in which a juror should be permitted to impeach her own verdict, the court properly refused to summon the other jurors. As the Court of Appeals ruled (Pet. 22):

> We do not say that there can be no threats short of violence by one juror against a recalcitrant dissenter that will upset a verdict, but certainly there was nothing in the case at bar to justify such action.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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